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Ethics and Individual Liberties

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Abstract

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In today's society, there is a genuine “paradox of sexual liberty”. On the one hand, it is difficult to deny the existence of a movement of sexual liberalization and democratization which expresses itself by coming out of the penal space of adultery or homosexuality and increasingly acknowledging, on a social level, sexual minorities. On the other hand, it is just as difficult to deny the existence of a movement of punishing sexuality.

To some jurists and philosophers, these two trends are not at all conflicting, for both would emphasize the importance that the concepts of consent and human dignity have acquired in our society.

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1. Introduction

In today's society, there is a genuine "paradox of sexual liberty". On the one hand, it is difficult to deny the existence of a movement of sexual liberalization and democratization which manifests itself by coming out of the penal space of adultery or homosexuality and increasingly acknowledging, on a social level, sexual minorities such as gay, lesbian, between different species, etc. On the other hand, it is just as difficult to deny the existence of a movement of punishing sexuality, which is expressed, among other things, by the new names given to crimes which are called explicitly "sexual", by the severity of punishments against their perpetrators, by the tendency to punish sadomasochistic games which never ceases to repress pornography and prostitution one way or another (Lameyre, 2005).

2. Consent and Human Dignity

To some jurists and philosophers, these two trends are not at all conflicting. Both would emphasize the importance that the concepts of *consent* and *human dignity* have acquired in our society. We should increasingly tolerate consensual sexuality of any kind and repress more and more non-consensual sexuality that prejudices the individual's dignity: rapes and sexual aggressions (Mossuz Lavan, 2002; Vigarello, 1998; Fabre & Fassin, 2003). But, if the notion of consent were just as fundamental in terms of sex, in the right and moral of our society, prostitution and sadomasochistic relationships would not have been the subject of any legal or moral repression. But it is far from being so. The political and moral project to harass those who offer sexual services has not been really abandoned and, in some countries, the desire to add on penalties even for clients can be noted (Chassaing, 2005).

The same thing applies to sadomasochistic games, as a recent decision of the European Court of Human Rights shows. The Court refused to condemn the judge that had imposed heavy sanctions of imprisonment on homosexual individuals that had consented to sadomasochistic games among adults (Cayla, 2005).

In fact, the ECHR resumed the argumentation of the House of Lords according to which the consent to mistreatment in sadomasochistic games is not a valid defence: in terms of blows and injuries, the victim's consent does not cancel the offending nature of the act (Cayla, 2005).

Actually, consent is not the criterion of legality or illegality of act as regards prostitution or sadomasochistic games. It is the same in other areas as well. Let's think about organ sales or child abandonment which are repressed even when they are the consequence of the act of the people who have consented.

Any attempt to present this double tendency, that of liberalization and that of criminalization, as a coherent and harmonious whole imposed by the notion of consent is in fact defective, for it represses, at the same time, the acts to which the victims did not consent (rapes) and others to which the participants consented (sadomasochism).

It is perhaps one of the reasons that scientists, eager to find coherence where none exists, appeal to the notion of human dignity, and which must acknowledge that consent is not enough to explain the apparent paradox of sexual liberation.

It is in the name of human dignity that we repress, at the same time, certain sexual acts to which the victims did not consent, such as rapes, and others to which the participants consented, for instance

sadomasochistic games. It is also in the name of human dignity that we should respect minority sexualities. This normative assumption would draw us away from the explanation by consent. It has been recently defended, but is not more convincing.

However, sadomasochistic games should not be condemned in the name of human dignity but in the name of health risks, as proved by the European Court decision (Cayla, 2005). It is not by appealing to human dignity that minority sexualities are respected, but by appealing to equality. Finally, it is not to protect human dignity but the fragile spirit of minors that the diffusion of pornography is controlled. In short, the two tendencies, that of liberalisation and of criminalisation, cannot be harmonised one with another by means of a unique concept, consent or human dignity.

Liberalisation and criminalisation are contradictory tendencies and the problem for the most liberal is that the criminalisation tendency is no less influential. One of the most alarming intellectual phenomena, from this point of view, is that the two arguments, of consent and human dignity, are systematically exploited in order to morally intensify the movement of criminalisation of sexuality to the detriment of the liberalisation movement.

Instead of contributing to the development of public and individual liberties, the appeal to consent and human dignity ends up by threatening them. It is some kind of perverse effect, if one may say so, when it comes to sexuality.

In early 19th century, Jeremy Bentham was the first to defend the idea that sexual relationships, of any kind, should not be punished by law when people who have consented are involved.

The same idea is also found with J. St. Mill. All relationships are legitimate between individuals who have reached maturity and have consented to these relationships, including all those that might cause certain reciprocal damage so long as they do no harm to a third person or in an indirect manner (Mill, 1990: 40-44).

Contrary to what one might think, this idea was never imposed, either in law or in general ideas, even in the most democratic societies. It should be said that it is not, however, free from confusion.

Nobody, not even the most liberal person, denies that the notion of consent between partners of a contractual, sexual or any other relationship would have a benefit were it clarified.

Hart, who is sympathetic to Mill's liberal ideas and dismisses the political paternalism which he finds both too insistent and obsolete, estimates that the view of consent must be changed in order to adapt it to our current psychological ideas (Hart, 1963, pp. 32-33).

It is assumed that, from this time forward everybody knows how we have got to consent, in a contractual relationship, to any clause, without having seriously reflected, without having read it all or without having understood it all, without having been able to consider all the consequences of our consent, caught by a fleeting desire or by the partner's psychological manipulation, too subtle to be known and grasped by us as a form of constraint. In order to make us lose our last illusions, we are reminded that there are equally sociological judgments to doubt the real significance of consent in certain circumstances; to what extent have they who have agreed to work in inhumane conditions for a pittance (Wilcockson, 2000, pp. 50-60) really "consented" if they have no other means to survive?

It may be said that, in a certain sense, we always give our consent in the relationships we maintain, even when we are taken into slavery, because we could have always chosen not to have them or put an end to them thus not compromising ourselves.

And in another sense, we could have never really consented to this, even in the case of explicitly verbal or non-verbal agreement, for we are always more or less constrained by the options we are offered, for we may always have the feeling that we have not approved of all, basically infinite, consequences, of what we have consented to, for we have done it from the bottom of our hearts, etc.

Philosophers are generally very proud of this kind of conclusions. But perhaps they should not take these paradoxes far too serious if they forbade us, for instance, to introduce the slightest distinction between what we endure in case of physical, direct constraint and what we do in circumstances of limited choice on an unfavourable market or under the “influence” of amorous subjugation, of “mental bewilderment” (Iacub, 2005, pp. 166-170) or because we are fascinated by a profession (singer, filmmaker, mannequin, celebrity, TV presenter, professional footballer, comedian, etc.) and we cannot absolutely consider we must do otherwise.

However, we may have the impression that, in sexual matters, legal and outside, in public debate, there is precisely this kind of confusion between what we do and what we endure, which becomes the rule (Iacub, 2005, pp. 166-170).

The tendency seems to be to negate the reality of consent by confusedly invoking sociological considerations (consent is always more or less economically, socially constrained) or psychological ones.

It follows that, in these sexual matters, the class of behaviours whose supposedly luscious nature is annulled by consent tends to empty while the class where it is not present tends to fill.

Moreover, an increase in the motives for repressive intervention in terms of sexual matters may represent a danger to individual liberties. For all these reasons, the definition of consent becomes an important political and moral stake.

We should not be surprised to see philosophers chime in debates. Even if it comes to defining an abstract notion such as truth, justice, love... or consent, they seem to think that it is their professional duty to suggest one of these and that they are especially qualified to do it. It is a bizarre trend, given that they probably know better than others that these notions are, by nature, difficult to define, that is, to reduce them to simpler and better understood ideas.

3. Considerations on the Issues Raised by the Notion of Consent

Here are some of the difficult issues the notion of consent raises:

1. The cases in which the notion of consent or lack of consent is included “analytically”, i.e. by definition, in the classification of even an offence. Think about theft or rape. These terms only have meaning in relation to the idea of lack of consent. What would “a theft to which the victim has consented” mean? How would that be called a theft? The same applies to rape. What would “a rape to which the victim has consented” mean? In what way would that be a rape? There can be no theft or rape that to which we have consented.

2. The cases in which the notion of consent or lack of consent is not included “analytically”, or by definition, in the classification of the offence proper. Think about murder or blows and injuries. While there can be no theft or rape that to which one has consented, there can be blows and injuries and killing to which one has consented. Basically, that is what it comes down to in boxing matches, surgical interventions or assisted suicide. With this second case class, we must answer an extremely difficult question of law or of morals: that to be aware of the conditions in which consent would cancel the damage, in which a murder, for instance, to which the victim has consented, could be considered an act that has nothing illegal or immoral about it. Contrary to what those believing that injustice is not done to he/she who has consented might think, this principle is far from being systematically defended by law. The question of consent identification criteria is raised. Psychologically speaking, there are three ways of defining these criteria.

1. Subjectively. Consent depending on the mental intimate states of partners. Example: in order to consent, it is necessary and sufficient to have the form of prior intention and not only to have said it, to perform the action and to have intentionally acted during all stages of the action.

2. Behaviourally. Consent is based on explicit, verbal and non-verbal but noticeable commitments of partners. Example: in order to consent, it is necessary and sufficient to say or express explicitly by physical non-aggressive attitudes, gestures of affection, etc.

3. Both. Consent depends on the mental states of partners and clear verbal and non-verbal commitments of partners.

Alongside of these purely psychological notions of consent, there are “sociological” ideas according to which internal mental states and individual verbal and non-verbal behaviours are identification criteria for consent which are neither necessary nor sufficient.

Under these conditions, the authenticity of consent must be established in relation to certain common ideas in one society or another, which refer to what a “rational”, “normal”, “unconstrained” person would intentionally do.

This is a frequently used argument to negate the fact that prostitution could be genuinely “wanted” or “accepted” by anyone. No “rational”, “normal”, “unconstrained” person would do this job, as suggested by the famous statement of those who deem it as the absolute evil. “Would you like your daughter to practise prostitution?”

The fact that the “sociological” perspective might justify certain results is not at all in their favour. Whoever they may be, there are three things to avoid in our choosing consent criteria:

1. They should not be self-destructive, i.e. so strict as to destroy the possibility of consent proper. If, in order to be correct to say that someone who has really consented to a sexual or other relationship must be one who has expressed their prior intention to engage in it, that they have done it without constraining, even emotionally, their partner, that they were completely aware of all the stages and all the consequences of the action, that they clearly and constantly expressed their agreement in verbal or non-verbal form, that they have done nothing else but what “normal”, “rational”, “unconstrained” individuals would have done according to certain common ideas, then no one would ever probably say about anyone that they have consented to whatever.

This kind of evasive criteria, which are impossible to satisfy, may be used to judge the reality of citizens' consent, in this case – democratic votes, for example.

The objective or behavioural criterion, i.e. slip a ballot in general, but specified conditions (not threat, violence, corruption, information on the manner of voting, etc.) is enough to guarantee the reality of consent. Should one incriminate the reality of voters' consent under the pretext that their choice was "influenced" by their social background, their professional situation, the attractiveness of a candidate, we could say that no choice was democratic. In short, it is worth more settling for less strict criteria to judge the reality of consent, at least in certain contexts.

2. They should not be contradictory. Let us think about American feminists who militate against pornography or in favour of intensifying repression against sexual aggressions on women (Mac Kinnon, 1993). They adopt an innocent attitude regarding the criteria of consent. To them, if a woman says "no", then it is "no". The behavioural criterion is enough. But when she says "yes", it is not "yes". The behavioural criterion is enough. We should like to know why.

3. They should not be arbitrary, i.e. at the discretion of those with repressive powers. In the absence of decisive theoretical judgments in favour of one criterion of consent or another, a pragmatic agreement should be privileged, at least in legal contexts. Such an agreement would be justified in the eyes of those who keep thinking that public and stable criteria for identifying consent are indispensable to ensure the juridical security of individuals (Iacub, 2005). What is important, in the legal context, is less the theoretical judgments made to choose a notion of consent over another by those judging rationally, as constancy in carrying into effect that which has been chosen. All this obviously does not prevent moral philosophers from continuing the debate on the best view of consent, if they wish to do so.

In definition, nothing compels one to accept the notions of self-destructive consent, strict notions, that is, so as not to destroy the possibility of consent proper, contradictory or arbitrary.

On the other hand, from a normative point of view, I found it futile to try and attach an absolute moral value to the idea of consent or make this moral value of supposedly intimate relationships between the notion of consent and that of autonomy or freedom dependent, as many philosophers do. It should be said that to connect the normative destiny of consent to the notions of autonomy or self-determination may not be a good strategy, considering all moral targets these notions aim at. Thus, the fact that a decision is the result of an "autonomous" choice may make it even more repulsive. Let us think about someone's decision to join the SS: it will probably be judged with less detachment if it is not truly "autonomous" (Wertheimer, 2003, pp. 144-162).

The most liberal may very well settle for giving consent a relative, dependent value to the extent to which it contributes to complying with the principles of not harming one's fellow or of equal consideration.

Indeed, among the damages that may be caused to someone, there is of course that of humiliating them, mocking their opinions for everything that concerns them. Among the offences to the principle of equal consideration towards the other there is that which lies in behaving in a paternalist manner in this respect, in treating them as more insignificant than they really are. To comply with the clauses of

consent might therefore mean to go back to avoiding speaking about the injustices of one's fellowman or treating him unequally.

This minimalist idea of consent is not based on too strict, contradictory criteria, at the discretion of those with repressive powers. It is justified by the principles of non-violence and equal consideration and not grounded on freedom or autonomy values.

The most virulent enemies of the so-called morals of consent manifest themselves most often by attacking pornography or prostitution. They oppose the defenders of freedom to prostitute or of the right to produce or consume pornography.

The argument of those criticising the morals of consent is absurd: first of all, partners' consent in these areas does not exist and, in any case, has no moral value.

They start by stating that a female prostitute or porn actress never truly consent, in this regard, that they are constrained to do what they do, one way or another: when constraint is not material (caused by the absence of choice on the labour market), it is "psychological" (probably entailed by the indiscriminating love of pimps, hardcore porn directors, nymphomania, vanity, stupidity, lack of education, etc.).

To achieve this, they exploit too strict, and rather contradictory, an idea of consent. According to them, it is not enough for a prostitute or porn actress to say that they agree to do their job, for this is the truth.

They should give further, non-verbal evidence that has not been specified beforehand. In this regard, their view of consent is very strict.

However, on the other hand, when a prostitute or porn actress end up by saying they do not consent, their scepticism melts like snow in the sun. Verbal evidence is enough. In this regard, their view of consent is contradictory. To have consent, verbal criterion is not enough, for non-consent, it is enough.

The credulity with which certain ultra-dramatised testimonies given by prostitutes or porn actresses are received today by both the general public and the so-called experts one would expect to be less naïve (philosophers, psychologists, sociologists, etc.) contrasts with the quite general scepticism regarding the less unfortunate testimonies such as those of Grisélidis Réal or Ovidie (Real, 2006; Ovidie, 2002). It is yet another different expression of the existence of contradictory views of consent as regards sexual matters. For dramatic testimonies, the verbal criterion is enough, for non-dramatic ones, it isn't.

Faced with the resistance of actresses or prostitutes who accuse them of having treated them in a condescending manner, who reject this contradictory or too demanding concept of consent, they change the subject and say that, in any case, their consent is not enough, for these activities are "objectively immoral".

They move further, when it is convenient to them, from: "there is no authentic consent in these cases" to "consent is not enough in these cases, even if it is authentic".

They do not hesitate to play with these two conflicting registers.

Those who are a bit more honest choose one thing or another. Some admit strongly that to them there are things we should do (sadoomasochistic practices, exhibitionism, prostitution, pornography, surrogate mothers, organ sale, etc.) even if we consent to them, even if they cause no physical or

psychological damage to other people but themselves, even if they are only sources of curiosity, excitement, pleasure. For what? Because a “superior value” transcends our will, forbids it. Because this would be contrary to human dignity.

But some of these activities, organ transfer, multiple sexual relationships among others, are not deemed as “contrary to human dignity” when they are disinterested. In general, one would not say that it is contrary to “human dignity” to give one’s organs or have unpaid, multiple or not, sexual relationships.

Under these circumstances, we may wonder how it is that the moral value of an act can change so radically, that it passes from admirable to disgusting; it’s simple, because it stops being free.

The answer is not so obvious as we might think. With deceit, blackmail, murder, false testimony and other standard mores, things are not like this. Lying, torturing, blackmailing, bringing false testimony is serious when it is free, i.e. an act accomplished without any financial compensation.

One may even consider that these acts are even more morally repulsive when they are disinterested. To Hannah Arendt, the difference between sheer malice and radical evil is that sheer malice is always interested, selfish, while radical evil is disinterested (Arendt, 2005).

From a less lyric viewpoint, it is considered that racism or anti-Semitism may be aggravating circumstances in certain crimes, like kidnapping with the intention to obtain ransom. This means that such acts might actually be less serious if the motive were purely material.

Some may say the same about prostitution. What its opponents typically object to is the commercial element. To them, there is nothing wrong with having sexual relationships of any kind, even with very many partners (and even with very many partners at the same time). What is nevertheless wrong is doing it for money or any other form of material compensation.

But to most of the puritans, the number of sexual partners is the main vice of prostitution. It is not certain that, to them, gratuity would cancel the vice. They might even get to consider that the person “sleeping around” for free only for the pleasure of it or because they enjoy sex, or sexual promiscuity, is more to blame than those who do it for money, under economic constraints. To puritans, gratuitous prostitution is more disgusting than paid sexual activities.

On the other hand, we should not all the more believe that, in terms of organ donation or location, gratuity should always be deemed as a virtue. Think about surrogate mothers. One starts by objecting that they contribute to the trade of sacred things (pregnancy, maternity, etc.). then, when it is proven that they do it for free for sterile couples, one goes out of one’s way to find other reasons to blame them (child welfare, among other things, obviously).

Finally, according to the adversaries of substitution pregnancies, gratuity solves nothing. In judging, they pass unawares to: 1. “This is not right because it is not for free”.

2. “Even if it were for free, it wouldn’t be right”.

These examples show that organ sales, prostitution or pornography do harm to human dignity.

The complicated moral issue is to know why certain acts are supposed to prejudice “human dignity” (organ selling) and others are not (organ donation), when the difference between them is not one that requires a moral distinction (to be for free or not).

One cannot say that friends of “human dignity” have seriously looked into this matter. But they very well may not be interested in it. It is possible that the argument of “the need to protect human dignity” should be more political than conceptual or ethical. This may be one of these pompous words they throw to the public in order to impress without any concern for coherence or justification. For what purpose? In these fields, one can only make assumptions.

Generally, the call to “human dignity” as basis for or justification of rights, principles and penal policies or others deriving from here, is not politically neutral. Traditionally, to progressists, what provides the basis for rights and principles is first the long history of their acknowledgment, hence of political struggles and philosophical debates.

The return to the argument of “human dignity” is mainly made by conservative or religious authorities that want to reaffirm the existence of a transcendent order. It is no wonder that progressists resume it. It is not their first and only intellectual concession made to conservatives, whose ideas are rather dominant today. The problem is that they place themselves at a disadvantage in terms of defending the rights they have promoted.

Through some kind of diversion from its initial significance, certain rights that have been gained with difficulty or are far from being completely recognised in democratic societies (the rights of non-heterosexuals to marry and have children, the right to assistance in the voluntary termination of life, the right to choose one’s own sexual identity, etc.) are today disputed in the name of “human dignity”. Furthermore, in the name of “human dignity”, the so-called sexual moralities of consent, those praising one’s freedom to live their life as they understand it from this point of view as long as they do no harm to the other, are criticised.

One of the most alarming intellectual phenomena nowadays, in the field of individual liberties, is that the ideas of consent and “human dignity” are systematically exploited in order to consolidate the sexuality criminalisation movement instead of contributing to the liberalisation movement.

4. Instead of Conclusions

We have tried to show that this perverse effect is based on:

1. The development of too strict, contradictory ideas of consent.
2. The development of the concepts of “human dignity” whose political border is to challenge individual liberties such as those of leading a sexual life without any constraint except that of not harming the other.

In the political debate on sexual matters, these two tendencies reinforce each other when they are virtually contradictory.

The first one says indeed: “There is no authentic consent in prostitution or pornography”, while the second: “There is authentic consent in prostitution or pornography, but it is an aggravating circumstance: one should never choose to be a prostitute or porn actress, for these activities are contrary to human dignity”.

It is obviously difficult to criticise positions that oppose each other without any concern for coherence.

One should remember that the principles of minimal ethics may be of some assistance to the so-called morality of sexual “Consent” for those who keep seeing a significant moral progress here.

Minimal ethics is not “grounded” on consent regarded as an absolute value, but is broadly justified by the principles of non-injury, equal consideration and moral indifference of the relation to oneself.

At the same time, these principles may produce arguments against temptations to dispute the so-called morality of “consent” in the name of the transcendent value of “human dignity”.

These principles may be perfectly put at the service of the idea that each should be free to use their body and existence as they like or lead a life as they understand it, sexually or other, as long as they do not seek to harm the other.

If a minimalist project is plausible, if it is possible to extend on morality the political and legal principles of moral indifference of relating to oneself, of non-injury and of equal consideration, i.e. to give up on moral paternalism, then there may be some interesting consequences on the practical judgments of those pressuring political paternalism.

For a political or legal paternalism, a lawful State is entirely empowered to criminalise supposedly “immoral” behaviours not only in the narrow “moralist” sense of the term (reaching the “moral feelings” of the majority), but also in attaining the major abstract principles of “human dignity”, even when they are issues of “consenting” adults not causing any evident misfortune to other people.

The classic examples are duels or mortal gladiator fights which any State that is considered “civilised” should ban, even if they are the act of consenting adults. Prostitution and child abandonment are also common instances. If the legal moralist is unreformable (all that matters to them is the political opinion at a certain moment), political or legal paternalism is more open to discussing principles. Assuming they take on the minimalist view of morality, they will actually adopt, in their practical judgments, a tolerant attitude regarding the acts that have no negative effects on the third party (Moore, 1977).

They will say: naturally, a lawful State is empowered to criminalise whatever is called “immoral”, but using drugs that do no harm to a third person (or to benefactors) but only to themselves, sexual practices of any kind between consenting adults, assisted or not assisted suicide are not immoral. State cannot intervene in these areas.

In other words, should we admit the idea that there was nothing immoral in what we do and what concerns only us or in the relationships that are subject to consent, then the practical judgments of those pleading for the moral commitment of the lawful State and of those pleading for moral neutrality might enjoy the same attitude of tolerance with regard to these actions.

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